

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Qwest Corporation for)	WC 02-77
)	
Declaratory Ruling Clarifying that the Wholesale)	
DSL Services Qwest Provides to MSN Are Not)	
"Retail" Services Subject to Resale Under)	
Section 251(c)(4) of the Act)	

**COMMENTS OF NEW EDGE NETWORK, INC.
D/B/A NEW EDGE NETWORKS**

New Edge Network, Inc. ("New Edge Networks") respectfully submits these comments in response to Qwest's Petition for Declaratory Ruling ("Petition") requesting that the Federal Communications Commission ("Commission") clarify that certain services provided by Qwest to an unaffiliated Internet service provider ("ISP") are provided on a wholesale basis. As such, these wholesale services would fall outside the scope of the resale pricing obligations pursuant to section 251(c)(4) and 252(d)(3) of the 1996 Telecommunications Act ("96 Act").

New Edge Networks provides digital subscriber line ("DSL") and enhanced data communications nationally in small and midsize cities where populations generally range from 5,000 to 250,000. The company's DSL service is available in more than 360 small and midsize cities in 29 states. New Edge Networks also owns and operates a national data communications network with 18 regional hubs and almost 600 nodes, making it one of the largest asynchronous transfer mode ("ATM") networks in the United States.

New Edge Networks provides competitive DSL, ATM and frame relay services through a combination of its own facilities (multi-service platform switches collocated in central offices), unbundled network elements, tariffed

services and resale. As such, New Edge Networks is dependent upon the resale and unbundling obligations contained in the 96 Act to deliver competitive advanced services to retail and wholesale customers.

I. INTRODUCTION

Qwest's Petition raises numerous interesting questions regarding how the company delivers DSL services to its retail and wholesale customers. Moreover, the Petition itself provides evidence that Qwest discriminates in its provisioning of DSL services. As a competitive local exchange carrier ("CLEC") that attempted to negotiate with Qwest the purchase of Qwest DSL services pursuant to the resale obligations contained in the 96 Act, New Edge Networks feels compelled to address certain comments made by Qwest in its Petition and requests that the Commission clarify its rules regarding the incumbent LECs' resale obligations for interstate advanced services, including DSL. In addition, New Edge Networks strongly advocates that the Commission takes notice of Qwest's discriminatory tactics as it finalizes its position regarding the appropriate regulatory requirements for incumbent LEC broadband services and broadband access to the Internet over wireline facilities.

II. RESPONSE TO QWEST'S COMMENTS

With respect to specific comments made by Qwest in its Petition, New Edge Networks shall respond to the second footnote in Qwest's Petition.

Specifically, Qwest asserts:

No competitive LEC has requested that Qwest provide its bulk interstate DSL service at an avoided cost discount, and the issue is not currently before the Minnesota PUC in an arbitration or other proceeding. The Commission thus need not decide whether state commissions are authorized to determine whether interstate services are offered to end users for purposes of sections 251(c)(4) and 252(d)(3).¹

¹ In the Matter of Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides MNS Are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act, Petition for Declaratory Ruling, WC 02-77, pg. 2.

New Edge Networks, however, did request that Qwest provide its interstate advanced services, including DSL, at an avoided cost discount. In fact, New Edge Networks filed comments in a Montana proceeding regarding its attempt to negotiate with Qwest the purchase of interstate advanced services, including DSL, pursuant to the resale obligations contained in the 96 Act.²

With respect to interstate advanced services other than DSL services, Qwest had three arguments supporting why it would not allow New Edge Networks to apply the avoided cost discount to interstate services purchased for resale purposes. First, Qwest stated that its interstate services have historically been provided for carriers on a wholesale basis. Second, no state public utility commission has set a wholesale discount for resale of interstate services. Third, Qwest cited the Commission's finding that interstate exchange access services are wholesale services, not retail services, and therefore not subject to the avoided cost discount.³

All of Qwest's arguments were specious and Qwest ultimately agreed that New Edge Networks could purchase Qwest's interstate ATM and frame relay services for resale purposes pursuant to an avoided cost discount. The method for implementing this, however, is still in question.

With respect to DSL services, Qwest argued that New Edge Networks asked Qwest to resale a product that it does not offer at retail to subscribers. Specifically, Qwest stated:

Qwest has two retail DSL service offerings. In the first, Qwest offers DSL service to its retail end users, and the end users must also have Qwest's voice service in order to request Qwest DSL service. Qwest DSL service is available for resale by CLECs at a wholesale discount. Thus, by the express terms of the Act, the reseller CLEC must also resell voice service to an end user in

² In the Matter of the Investigation Into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. D2000.5.70, New Edge Networks' Notice of Intent to Participate in CLEC Forum and Summary of Issues.

³ In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. D2000.5.70, Qwest Corporation's Responsive Comments for the January 9, 2002 CLEC Forum, pgs. 6-7.

order to resell Qwest DSL service to that end user, just as is required of Qwest retail operations.⁴

To clarify, Qwest's position is that it does not provide a retail DSL product on a stand-alone basis and any CLEC wishing to resale Qwest's DSL services must also resale its voice services. When New Edge Networks pointed out that ISPs are not required to resale Qwest's voice services when they resale Qwest's DSL services, Qwest cited the Commission's previous finding that DSL services designed for and marketed to ISPs for their use in providing their information services to the public are wholesale services not subject to the wholesale discount. Accordingly, Qwest is not obligated to provide a second wholesale discount when CLECs resale Qwest's wholesale DSL service.⁵

New Edge Networks made it perfectly clear to Qwest personnel that it was requesting that the avoided cost discount apply to the retail rate, not the volume discounted rate. Of course, New Edge Networks would prefer that the avoided cost discount apply to the volume discounted amount, however, New Edge Networks believed it had a better chance of getting the avoided cost discount if it applied to the retail rate. Qwest still denied New Edge Networks' request based on Qwest's first argument that DSL and voice services cannot be separated for resale purposes.

As part of this proceeding, New Edge Networks believes that the Commission should address, and clarify, its position regarding Qwest's resale obligations for interstate advanced services including DSL. Specifically, New Edge Networks requests that the Commission address the following:

1. Interstate advanced services offered by incumbent LECs to retail customers are subject to sections 251(c)(4) and 252(d)(3) resale requirements; and
2. Interstate DSL services offered by incumbent LECs to retail customers are subject to sections 251(c)(4) and 252(d)(3) resale requirements without requiring the telecommunications carrier to resale the incumbent LEC's voice services.

⁴ Id.

⁵ Id.

New Edge Networks recognizes that it can file for arbitration with Qwest in each of the 14 states where Qwest is an incumbent LEC and have the state public utility commissions decide the issue on a case-by-case basis. However, as Qwest stated in its Petition:

Disputes concerning these federally tariffed Internet access services are properly resolved not on a balkanized state-by-state basis, but on a national level by the federal agency that, for decades, has fueled the growth of the Internet by exempting it from disparate or burdensome state regulation.⁶

III. QWEST'S DISCRIMINATORY TACTICS

Another major issue that concerns New Edge Networks is Qwest's ability to discriminate in the provisioning of DSL and other services to ISPs and CLECs through the use of confidential agreements. For example, Qwest states in its Petition that MSN is purchasing Qwest's DSL services pursuant to Qwest's FCC tariff. As such, MSN has the following obligations pursuant to Qwest's FCC tariff:

1. Must purchase QWEST DSL HOST Service in all LATAs where the customer subscribes to QWEST DSL Service;
2. Must submit orders to the Company electronically in a format and manner designated by the Company;
3. Must provide customer premises equipment to its end users;
4. ***Must deal directly with its end users and be solely liable with respect to all matters relating to the service, including marketing, ordering, technical support, billing and collections;***
5. Must direct end users not to contact the Company regarding any aspect of the service; and
6. Must communicate an end user's request to disconnect QWEST DSL Service to the Company within two business days of end

⁶ In the Matter of Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides MNS Are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act, Petition for Declaratory Ruling, WC 02-77, pgs. 3-4.

user's notification to the customer purchasing under any QWEST DSL Volume Plan.⁷

However, Qwest and MSN entered into a number of confidential agreements significantly altering MSN's obligations. Pursuant to those confidential agreements, Qwest provides MSN with *marketing, billing and collection services* related to MSN's broadband product. Contrary to Qwest's assertions, these confidential agreements significantly alter the basic relationship between Qwest and MSN established under the federal tariff.⁸ Thus, the Petition itself clearly shows that MSN is not under the same obligations as any other ISP, or CLEC, purchasing DSL services from Qwest's FCC tariff.

Furthermore, evidence presented by the Minnesota Department of Commerce clearly indicates that MSN is the preferential ISP for Qwest's DSL services. This evidence includes special pricing arrangements between Qwest's voice services and MSN's broadband services and special advertising, marketing and promotional material. This type of discriminatory treatment of ISPs clearly violates the Commission's finding in the AOL Bulk Services Order that Qwest provide DSL services upon reasonable request, on just, reasonable, and nondiscriminatory terms, and in accordance with all applicable tariffing requirements.⁹

IV. CONCLUSION

New Edge Networks encourages the Commission to take Qwest's discriminatory tactics into consideration as the Commission proceeds with this Petition and with its rulemakings regarding the regulatory requirements for incumbent LEC broadband services and the appropriate framework for broadband access to the Internet. As evidence by this Petition, Qwest is already

⁷ Qwest Corporation, Tariff FCC No. 1, Section 8.4.4.A.2.

⁸ One has to ask why Qwest and MSN needed separate confidential agreements if the basic relationship established under the federal tariff has not been altered.

⁹ Second Report and Order, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd 19237, para. 21.

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discriminating against ISPs and CLECs under the existing regulatory framework.

Removing tariff requirements and re-classifying telecommunications services as information services will only exacerbate the problem. If allowed to continue, it is the incumbent LECs and not consumers that will decide the fate of thousands of ISPs as more and more end users transition from dial-up to broadband services.

Respectfully Submitted,

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